STATE OF MICHIGAN

COURT OF APPEALS

AMY TOUCHSTONE and RUSTY TOUCHSTONE, Individually and as Next Friends of TANNER TOUCHSTONE, a minor,

Plaintiffs-Appellants,

and

JENNIFER M. GRANHOLM, Attorney General of the State of Michigan, and MICHIGAN DEPARTMENT OF COMMUNITY HEALTH,

Intervenors-Appellants,

V

DR. KENNETH MICHAEL MacKINNON, FAMILY MEDICINE ASSOCIATES of MIDLAND, P.C., and COLEMAN FAMILY MEDICINE,

Defendants-Appellees.

UNPUBLISHED
January 28, 2003

No. 228068 & 228071
Midland Circuit Court
LC No. 97-007233-NH

Before: Owens, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs appeal as of right from a judgment of no cause of action. We affirm.

Plaintiffs contend that the trial court abused its discretion in allowing two physicians, who were not family practitioners, to testify as experts regarding the standard of care required of a board certified family practitioner. As part of this issue, plaintiffs also contend that the evidence was inadmissible pursuant to MCL 600.2169. MCL 600.2169(1) provides in pertinent part as follows:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

We review de novo issues of statutory construction. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002).

We review a trial court's ruling that a witness is qualified to render an expert opinion for an abuse of discretion. *Tate, supra* at 215. A trial court's ruling on the admissibility of specific testimony is also reviewed for an abuse of discretion. *Id.* "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Here, we agree that both expert witnesses' testimony came very close to improper "standard of care" testimony. However, both witnesses focused their testimony on causation—a material issue in dispute. Accordingly, we are not persuaded that the testimony ran afoul of MCL 600.2169. Consequently, the trial court did not err as a matter of law or abuse its discretion in allowing the testimony. *Tate, supra* at 215.

Plaintiffs also contend that the trial court abused its discretion in allowing testimony inferring that plaintiff Amy Touchstone use's of "Category C" drugs during the first trimester of her pregnancy may have caused Tanner's injuries. However, the relevant expert's trial testimony deviated from what plaintiffs anticipated (based on the expert's deposition testimony). In fact, the expert's testimony fell well short of suggesting that there was a causative link between the use of the drugs and the purported injuries. In the absence of any testimony that the medication caused Tanner's injuries, we are not persuaded that the trial court allowed inadmissible testimony. *Tate, supra* at 215. Moreover, we note that the jury never reached the issue of causation; consequently, any error in admitting the evidence was harmless. See *Knoper v Burton*, 383 Mich 62, 68; 173 NW2d 202 (1970).

Plaintiffs further contend that the trial court abused its discretion in allowing the introduction of irrelevant and prejudicial information about plaintiffs' marital difficulties and plaintiff Amy Touchstone's personal problems. Here, the trial court ruled that defendants' expert could not testify about the marital difficulties, and defendants' expert did not testify about plaintiffs' marital difficulties. As such, it is not clear that the trial court allowed the introduction of any testimony about plaintiffs' marital problems.

In addition, the trial court only allowed defendants' expert to comment on plaintiff Amy Touchstone's mental health because it was relevant to her perceptions of Tanner's behavioral development. Indeed, one of the issues in this case was the disparity between her perception of Tanner's behavior and others' perceptions of his behavior. To the extent that Tanner's behavior was "normal," but perceived as abnormal by plaintiff Amy Touchstone because of her mental

health problems, we agree that the evidence was both relevant and material. Accordingly, we do not believe that the trial court abused its discretion in allowing the evidence.[1] *Tate, supra* at 215.

Plaintiffs note that each juror was provided a large notebook containing medical records. Among the records in the notebook was defendants' expert's three-page report, which referenced plaintiff Amy Touchstone's history of depression and use of antidepressant medication. Plaintiffs did not object to the report being in the notebook until the ninth day of the trial. Ultimately, the trial court ordered the report removed from the notebook. Plaintiffs contend that although the trial court struck out references to the medications that Amy had taken, it left in "the balance of this negative material." However, plaintiffs' brief does not specifically state what "negative material" was submitted to the jury. Moreover, the record indicates that the trial court granted plaintiffs the relief they sought. As such, we are not persuaded that there is any merit to plaintiffs' contention of error.

Similarly, although plaintiffs contend that defendants unfairly emphasized the stricken material in their closing argument, plaintiffs' brief fails to cite to specific instances of improper argument. Regardless, our review of the closing argument reveals that defendants did not emphasize the stricken material. As a result, we find no error.

Finally, plaintiffs challenge the trial court's ruling that plaintiffs could not recall their expert, Dr. Marquardt. We review a trial court's denial of a party's request to recall a witness for further examination for an abuse of discretion. *Potts v Shepard Marine Construction Co*, 151 Mich App 19, 26; 391 NW2d 357 (1986).

We note that plaintiffs' recall request was complicated by their plan to have Dr. Marquardt deposed on the evening of the fifth day of trial. In other words, the instant matter was not just a matter of recalling the witness to the stand. Plaintiffs proposed that the questioning take place in a hotel conference room. Although plaintiffs indicated that the questioning would be brief, the trial court could certainly have found this to be an unreasonable request. Moreover, plaintiffs' primary reason for recalling Dr. Marquardt was to avoid a directed verdict. However, with the exception of one portion of plaintiffs' claim (which plaintiffs stipulated to be dismissed), defendants' directed verdict motion was unsuccessful. Because it is not clear that the trial court's ruling adversely impacted plaintiffs' case, we believe that the instant matter is plainly distinguishable from two of the three cases plaintiffs cite in support of their contention of error. See *Kornicks v Lindy's Supermarket*, 24 Mich App 668, 672; 180 NW2d 847 (1970); *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959).

With regard to the third case cited by plaintiffs, we disagree with plaintiffs' assertion that the trial court's ruling "cut the heart out" of plaintiffs' case. See *Knoper v Burton*, 12 Mich App 644, 649; 163 NW2d 453 (1968), rev'd on other grounds, 383 Mich 62, 68 (1970). In fact, with one exception, plaintiffs' offer of proof merely duplicated Dr. Marquardt's earlier testimony.[2]

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[1] Again, the challenged evidence was only relevant to causation and damages issues. Thus, because the jury did not reach these issues, any error in the admission of the evidence was harmless. See *Knoper, supra* at 68.

[2] The only additional testimony sought was Dr. Marquardt's alleged position that Tanner's "scalp pH would have been less than 7.2." However, we note that plaintiffs' counsel specifically asked
(continued…)

Accordingly, given the circumstances of the recall request and the minimal probative value of the potential testimony, we are not persuaded that the trial court abused its discretion by not allowing plaintiff to recall Dr. Marquardt. *Potts, supra* at 26.

Affirmed.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Mark J. Cavanagh

(…continued)

Dr. Marquardt whether Tanner's blood would have been less than 7.2. Dr. Marquardt testified that it was "purely conjecture" and stressed that the standard of care required *checking* Tanner's scalp pH. Thus, Dr. Marquardt was given the specific opportunity to opine whether Tanner's pH would have been less than 7.2, but declined to do so.